87-608 (1)

NO. _____

Supreme Court, U.S.
FILED
AUG 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Helmer T. PEDERSON,

Appellant

v.

Sylvan SHULMAN,

Appellee

APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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ATTORNEY FOR APPELLANT

August 26, 1987

30 pp

QUESTIONS PRESENTED

The ultimate question is whether or not the recharacterization by the Federal Court of appellant's residence as community property, thereby causing the entire property to become subject to execution by husband's judgment creditor to the exclusion of the wife's joint tenancy property rights, violated appellant's United States Constitution, Fifth and Fourteenth Amendment, and California Constitution, Article I, Section 7, rights to due process of law and equal protection of the laws.

Subsidiary questions:

1. Is it proper for a Federal Court to expand a California family law statute, which creates a presumption regarding the character of property in family law matters only, to a non-family law matter involving a third party creditor, particularly where the debt is not a community debt.

2. Are the Federal Courts bound by the

law and rulings of a party's domiciliary state in determining property rights as between the party and third party creditors?

LIST OF PARTIES

SPACETIME SYSTEMS CORPORATION, EDMOND J. E'CHAVARRIE, ALLEN H. K. CHUN, and HARRY STROMER were named defendants in addition to HELMER T. PEDERSON, the appellant herein. Judgment was rendered against all defendants except HARRY STROMER. So far as is known, plaintiff has sought recovery from PEDERSON only.

Appellant's wife, MARJORIE, was *not named* as a party and has *not appeared* in any proceeding involving this matter.

TABLE OF CONTENTS

	PAGE
INTRODUCTION	5
OPINION BELOW	6
JURISDICTION	7
CONSTITUTIONAL PROVISIONS	8
STATEMENT OF THE CASE	8
SUBSTANTIALITY OF FEDERAL QUESTION	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: **PAGE**

Clark v. Carter (1978) 70 C.R. 923, 265 C.A.2d 291..... 9, 12

Donahue v. Rhode Island Dept of Mental Health, Retardation and Hospitals By and Through Romeo, 632 F. Supp.1456 (1986)..... 12

Hansford v. Lassar (1976) 53 C.A.3d 374, 125 C.R. 804..... 11, 15

Hulse v. Lawson (1931) 212 Cal 614, 299 P 525..... 11

Marriage of Lucas (1980) 27 C.3d 808, 166 C.R. 853, 614 P.2d 285..... 10

Marriage of Millsberg (1979) 150 Cal Rptr 142..... 10

Nash v. State of Texas (1986) 632 F. Supp.951..... 13

Schindler v. Schindler (1954) 126 C.A.2d, 272 P2d 566..... 9

CALIFORNIA CODES:

California Code of Civil Procedure Section 704.820(a)..... 13

California Civil Code, Section 4800.1(b). 10

TREATISES:

Witkin on Civil Procedure, Third Edition (1985) page 214, Volume Eight..... 13

The statutory provision that confers jurisdiction of this Appeal on this Court is 28 U.S.C. §1254

UNITED STATES CONSTITUTION AMENDMENTS
FIFTH AMENDMENT
FOURTEENTH AMENDMENT

CALIFORNIA CONSTITUTION
Article 1, Section 7

THE STATEMENT OF THE CASE

INTRODUCTION

Appellant appeals from the final order and judgment of the United States Court of Appeals for the Ninth Circuit entered on May 7, 1987 denying appellant's petition for rehearing, and its judgment entered on April 9, 1987, affirming the judgment of the United States District Court, Southern District of California holding appellant's residence property to be community property apparently pursuant to California Civil Code, Division 4, Part 5 ("The Family Law Act"), Section 4800.1 ("Legislative findings and declarations; property acquired during

marriage in joint form presumed community property; division of property upon dissolution or legal separation") and therefore subject to execution to satisfy a judgment against the husband only, where the subject property was acquired by appellant before marriage as his sole and separate property in fee simple and four years after marriage, and some twenty years prior to this judgment, was transferred by appellant to himself and his wife as joint tenants.

OPINIONS BELOW

The Order for Sale of Dwelling is printed in Appendix A hereto. The opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix B hereto. The Order (denying appellant's petition for rehearing) is printed in Appendix C hereto. The Notice of Appeal is printed in Appendix D hereto.

JURISDICTION

The original law suit was filed in The United States District Court, Central District of California (Case Number: CV 81-6466-RMT(Mx)). The United States District Court, Southern District of California, ordered the sale of Appellant's dwelling on December 13, 1985. (Appendix A). The United States Court of Appeals for the Ninth Circuit affirmed the District Court's order on April 9, 1987. (Appendix B). The judgment order denying appellant's petition for rehearing was entered on May 7, 1987. (Appendix C). A timely notice of appeal to this Court was filed on May 22, 1987. (Appendix D). This appeal is being docketed in this Court within ninety days from the denial of the rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS

No person shall be deprived of property without due process of law (U.S.Const., 5th and 14th Amend.), nor shall any State deny to any person within its jurisdiction the equal protection of the laws (U.S.Const., 14th Amend.) A person may not be deprived of property without due process of law or denied equal protection of the laws (Cal.Const., Art. 1, §§ 1, 7).

STATEMENT OF THE CASE

Judgment debtor, HELMER PEDERSON, appealed from an order of sale of dwelling on November 6, 1985 in the United States District Court, Southern District of California. Despite title of the residential property indicating a joint tenancy between PEDERSON and his wife, the Court found the property to be community and therefore subject to execution to satisfy the judgment against PEDERSON.

Appellant maintains the district court erred in finding the property to be community, because the judgment creditor failed to rebut the presumption that the property was held in joint tenancy, as there was no showing of a common understanding or agreement to change the character, as required. Clark v. Carter (1978) 70 C.R. 923, 265 C.A.2d 291.

1. **Is it proper for a Federal Court to expand a California family law statute, which creates a presumption regarding the character of property in family law matters only, to a non-family law matter involving a third party creditor, particularly where the debt is not a community debt.**

Schindler vs. Schindler (1954) 272 P2d 566, 126 C.A.2d 597 has clearly stated that if a deed is taken in joint tenancy, this establishes a prima facie case that the property is, indeed, held in joint tenancy. All decisions researched which deal with the

applicable code sections and presumptions of community property pertained only to *dissolution, legal separation or probate proceedings,* such as Marriage of Lucas (1980) 27 C.3d 808, 166 C.R. 853, 614 P2d 285, and are therefore inapplicable.

Despite the fact that this case involves a creditor's attempt to satisfy a judgment, appellees' supporting statute applies to dissolution proceedings only and specifically involves property acquired during marriage; both criteria are inapplicable to the case at bar.

> "For purposes of property upon *dissolution of marriage or legal separation,* property acquired by parties *during marriage* in joint tenancy form is presumed to be community property."
>
> California Civil Code, Section 4800.1(b)

California case law indicates *the burden of proof is heavier on a third party than between spouses:* In Marriage of Millsberg (1979) 150 Cal Rptr 142, the court

spoke of a

> "...long recognized rule that the rights and obligations which spouses have with respect to third parties are not necessarily determinative of their property rights *INTER SE*".

In distinguishing, the court said,

> "It should be noted here that we are dealing strictly with the situation as between the parties to a marriage and *are not dealing with the characteristics of the property as against the claims of judgment creditors or other third persons as was the case in Hulse v. Lawson, 212 Cal.614, 299 P525*". [emphasis added].

While the cases do not label the joint tenancy presumption as CONCLUSIVE to third parties, the burden clearly shifts to the third party to...

> "...rebut by a preponderance of the evidence by establishing a common understanding of the owners or an agreement that the character was to be other than joint tenancy".
>
> Hansford v. Lasser (1976) 53 Cal App3d 374, 125 Cal Rptr 804.

The district court did *not* follow California case law and abused its discretion by not requiring Appellees to

satisfy the requisite burden of proof. As a consequence, a dangerous precedent, infringing upon the due process and property rights of individuals, has been established by allowing third party creditors to challenge the joint tenancy presumption of property with a mere reasonable inference or less, as occurred in the case at bar.

Even survival actions must overcome a burden of persuasion to which the Appellees were not subject:

> "For other purposes, such as survivorship, existing law that a joint tenancy deed creates a presumption of joint tenancy that can *only be rebutted by evidence of an agreement that the property is held in some other for of ownership still appears to be applicable*". [emphasis added]
> Clark v Carter (1968) 265 Cal App 2d 291, 70 Cal Rptr 923.

2. **Are the Federal Courts bound by the law and rulings of a party's domiciliary state in determining property rights as between the party and third party creditors?**

The district court was under an

obligation to follow California law.

> "The federal law is clear that in construing state statute, federal courts must defer to the highest court of the state as best arbiter of state law."
>
> Donahue v. Rhode Island Dept of Mental Health, Retardation and Hospitals By and Through Romeo, 632 F. Supp.1456 (1986).

The district court erred in failing to hold the appellees to the same California standard of proof as any other third party creditor in the area of joint tenancy, for it is well established that:

> "Federal court lacks jurisdiction to authoritatively construe state legislation; it cannot sit as "super legislature" and impose its own narrowing construction on state statute".
>
> Nash v. State of Texas, 632 F. Supp.951 (1986).

The district court failed to follow the decisions of the state's courts in interpreting the state law. This resulted in a taking of Appellant's entire residential property, without proper due process or compensation; a taking of property which was purchased by Appellant

prior to his marriage over 30 years ago.

> *"If a judgment debtor's interest is in a joint tenancy, the interest of the debtor, but not the dwelling itself, may be sold at execution."*
>
> California Code of Civil Procedure Section 704.820(a); Witkin on Civil Procedure, Third Edition (1985) Volume Eight, page 214.

SUBSTANTIALITY OF FEDERAL QUESTION

The questions presented on this appeal have never been passed upon by this Court. There have been many dissolution proceedings throughout the country characterizing property of the parties in settlement of their rights. Nowhere, except in the case at bar, did we find a case involving *creditor's rights* using *family law* statutes, cases and standards to characterize property. Appellee has repeatedly cited the Hansford case to support a recharacterization of the propery as community. Hansford is dissimilar, as the husband **fraudulently** conveyed his 1/2 of the

property to his wife AFTER an abstract of judgment was recorded; the Court found the property was community based on the parties' actions and intent to defraud, though admitting there were reasonable inferences to the contrary.

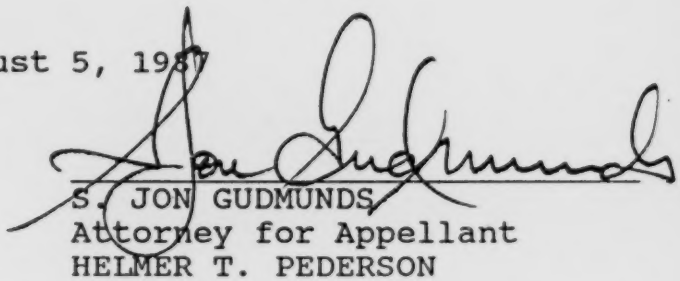
There was no such fraudulent transfer in the case at bar, yet the District Court improperly allowed the burden of proof to shift to the property owner which resulted in a misapplication of a state's laws, all of which is repugnant to the Constitutions of the United States and the State of California.

> "The burden is on the opponent to rebut the presumption by a *preponderance of the evidence*; ... there must be established a 'common understanding of the owners or an agreement that the character was to be other than joint tenancy.'"
>
> Hansford v. Lassar (1976) 53 C.A. 3d 374, 125 C.R. 804.

CONCLUSION

Probable jurisdiction should be noted. The questions presented by this appeal are substantial and the Court should reverse the decision below in order to correct the erroneous decision of the United States District Court, Southern District of California.

DATED: August 5, 1987



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APPENDICES

ITEM	PAGE
A. Order for Sale of Dwelling.....	A 2
B. Opinion, Ninth Circuit Court of Appeals.....	A 8
C. Order Denying Rehearing.....	A 10
D. Notice of Appeal.....	A 11
E. California Civil Code §4800.1(b)....	A 12
F. California Code of Civil Procedure §704.820(a).....	A 12
G. U.S. Constitution, Fifth Amendment..	A 13
H. U.S. Constitution, Fourteenth Amendment.....	A 13
I. California Constitution, Article I, Sections 1, 7.....	A 14

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 85-0042 (Misc.)

ORDER FOR SALE OF DWELLING
CCP §704.780(b)

SYLVAN SHULMAN,
Judgment Creditor,
vs.

SPACETIME SYSTEMS CORPORATION,
an Arizona corporation, et al.,
Judgment Debtors.

THOMPSON, District Judge.

The application of judgment creditor Sylvan Shulman for an order for the sale of that certain dwelling located at 241 North Pacific Avenue, Solana Beach, California, came on regularly for hearing pursuant to an order to show cause on October 28, 1985, in the courtroom of the Honorable Gordon Thompson, Jr., United States District Judge. The judgment creditor, Sylvan Shulman, appeared through his attorneys of record, Styn & Garland, by Jeffrey N. Garland, Esq.

Judgment debtor Helmer T. Pederson appeared through his attorney, S. Jon Gudmunds, Esq.

The court having received and reviewed the application, memorandum of points and authorities, declarations ad depositions of Helmer and Marjorie Pederson, submitted by all parties, and having heard the argument of counsel, and being fully advised in the premises, now, therefore, makes the following findings:

1. The dwelling commonly known as 241 North Pacific Avenue, Solana Beach, California, (hereinafter referred to as the "subject dwelling") is owned by Helmer T. Pederson and Marjorie M. Pederson, husband and wife, as joint tenants.

2. The subject dwelling constitutes community property of Helmer T. Pederson and Marjorie M. Pederson and is subject to execution to satisfy the judgment against the judgment debtor.

3. There is no homestead declaration

on file as to the dwelling.

4. Pursuant to Code of Civil Procedure §704.730, Helmer T. Pederson and Marjorie M. Pederson are entitled to a homestead exemption in the total amount of $55,000.00.

5. There currently exists a first deed of trust against the subject dwelling in favor of the Central Federal Savings & Loan Association of San Diego. The unpaid balance of the note which the deed of trust secures is $10,209.25 as of October 10, 1985. Daily interest is accruing on said balance at the rate of $1.77 per day from October 10, 1985.

6. The fair market value of the subject dwelling is $352,000.00.

Based on the foregoing findings, now therefore,

IT IS HEREBY ORDERED that the application of the judgment creditor is GRANTED, and the United States Marshal is directed pursuant to Code of Civil Procedure

§701.510 et seq., to sell the dwelling whole legal description is: "Lot 14 in Block 23 of Solana Beach, in the County of San Diego, State of California, according to Map thereof No. 1749, filed in the Office of the County Recorder of San Diego County, March 5, 1923. Excepting therefrom any portion thereof heretofore or now lying below the mean high tide line of the Pacific Ocean," and commonly known as 241 North Pacific Avenue, Solana Beach, California, in accordance with Code of Civil Procedure Section 701.510, et seq. all other legal requirements.

IT IS FURTHER ORDERED that the amount of the proceeds of the sale is to be distributed in the following order:

1. To Central Federal Savings & Loan Association of 3888 Calle Fortunada, San Diego, California 92123, the unpaid balance on the note secured by a first deed of trust on the subject dwelling, in the principal

amount of $10,209.25 as of October 10, 1985, together with any and all interest which accrues from October 10, 1985 to the time of sale less any payments of principal and/or interest which may be made by the time of the sale.

2. To Helmer T. Pederson and Marjorie M. Pederson the sum of $55,000.00.

3. To the levying officer for the reimbursement of the levying officer's costs for which an advance is not made.

4. To the judgment creditor, Sylvan Shulman, to satisfy the following:

(a) First, costs and interest accruing after the issuance of the writ pursuant to which the sale is conducted;

(b) Second, the amount due on the judgment with costs and interest, as entered on the writ.

5. To the judgment debtor, the amount remaining, if any.

IT IS FURTHER ORDERED that the actual

sale of the subject dwelling shall not take place prior to December 1, 1985; provided, however, that the judgment creditor and/or the levying officer may take any actions permitted by law to prepare for and/or notice the sale forthwith.

The clerk is directed to enter this order, and transmit a certified copy of the order to the levying order and to the Clerk of the United States District Court, Central District of California.

DATED: 11-4-85

/s/ Gordon Thompson Jr.

GORDON THOMPSON, JR.
Judge of the United State
District Court, Southern
District of California

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 85-6508
D.C. Misc. No. 85-0042-GT

MEMORANDUM*

SYLVAN SHULMAN,
Judgment-Creditor/Appellee,
v.

SPACETIME SYSTEMS CORP.,
Judgment-Debtor, and

HELMER T. PEDERSON,
Judgment-Debtor/Appellant.

SNEED, ALARCON and KOZINSKI, Circuit Judges
Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Justice,
Presiding

Argued and Submitted
April 6, 1987 -- Pasadena, California

The appeal is not moot. Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115, 116 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981). The district court's finding that the Pedersons intended their home to be held as community property was supported by substantial evidence in the record. The

home's sale was therefore proper. Cal. Code Civ. Proc. § 695.020(b) (West Supp. 1987).

Affirmed.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 21.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 85-6508
D.C. Misc. No. 85-0042-GT

ORDER

SYLVAN SHULMAN,
Plaintiff-Appellee,
v.

SPACETIME SYSTEMS CORP.,
Defendants-Appellees.

Before: SNEED, ALARCON and KOZINSKI, Circuit Judges.

Appellant's petition for rehearing is denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 85-6508
D.C. Misc. No. 85-0042-GT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SYLVAN SHULMAN,
Judgment-Creditor/Appellee,
v.

SPACETIME SYSTEMS CORP.,
Judgment-Debtor, and

HELMER T. PEDERSON,
Judgment-Debtor/Appellant.

NOTICE IS HEREBY GIVEN that HELMER T. PEDERSON, Judgment-Debtor/Appellant, hereby appeals to the Supreme Court of the United States from the final judgment of this court entered on April 9, 1987 (a rehearing of which was denied by this court on May 7, 1987).

This appeal is taken pursuant to 28 U.S.C. § 1257(2) of Title 28 of the United States Code.

DATED: May 20, 1987

/s/ S. Jon Gudmunds

S. JON GUDMUNDS
Attorney for HELMER T. PEDERSON

California Civil Code §4800.1(b):

For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property is to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

(1) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community.

(2) Proof that the parties have made a written agreement that the property is separate property.

California Code of Civil Procedure §704.820(a):

If the dwelling is owned by the judgment debtor as a joint tenant or tenant in common or if the interest of the judgment debtor in the dwelling is a leasehold or other interest less than a fee interest:

(a) At the execution sale of a dwelling, the interest of the judgment debtor in the dwelling, and not the dwelling, shall be sold.

Amendment V of the UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise in famous rime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the UNITED STATES CONSTITUTION:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of the laws; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CONSTITUTION:

Article I, Section 1: All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

Article I, Section 7: The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanors, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court.

87-608

Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

Helmer T. Pederson,
Appellant/Judgment Debtor,

v.

Sylvan Shulman,
Appellee/Judgment Creditor.

On Appeal from the United States Court of Appeals
For the Ninth District

MOTION OF APPELLEE TO DISMISS THE APPEAL OR AFFIRM THE LOWER COURT JUDGMENT

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QUESTION PRESENTED

The sole issue before this court is whether the United States Supreme Court has jurisdiction to adjudicate an appeal from the judgment of a Federal Court of Appeals which was based strictly upon the resolution of questions of fact inasmuch as:

(1) No federal or constitutional issues were raised;

(2) No state or federal statutes were declared invalid; and

(3) No issues of public interest were involved.

In fact, the only determination made by the lower courts was that appellee presented sufficient factual evidence to establish that the subject real property was the community property of appellant, thereby overcoming rebuttable presumptions to the contrary.

PARTIES TO THE PROCEEDINGS

The original parties before the United States District Court, Central District of California, were Spacetime Systems Corporation, Edmond J. E'Chavarrie, Allen H. K. Chun, Harry Stromer, and Helmer T. Pederson, the named defendants, and Sylvan Shulman, the plaintiff.

Only Helmer T. Pederson and Sylvan Shulman were involved in the proceedings before the United States Court of Appeals for the Ninth Circuit, which involved an appeal by Helmer T. Pederson of an order of the Southern District of California enforcing the judgment of the Central District of California.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	6
I APPELLANT'S MOTION TO DISMISS OR AFFIRM IS TIMELY AND PROPERLY RAISED	6
II THE APPEAL IS WITHOUT PROPER JURISDICTIONAL BASIS	8
III THE FEDERAL ISSUES ARE NOT SUBSTANTIAL AND WERE NOT RAISED IN THE LOWER COURT PROCEEDINGS	10
IV THE FINDINGS OF THE LOWER COURT WERE NOT CLEARLY ERRONEOUS AND, THEREFORE, MUST BE AFFIRMED	12
A. Due Deference Should Be Given To the Lower Court Judgment	12
B. The Lower Court Judgment Was Factually and Legally Correct	15
CONCLUSION	21

TABLE OF AUTHORITIES

Cases	Page
Adickes v. S. H. Kress & Co. (1970) 398 U.S. 144, 147 n.2 . . .	12
Anderson v. Bessemer City (1985) 470 U.S. 564, 573-574 . . .	13
Beck v. Beck (1960) 242 Cal.App.2d 396	15
Blau v. Lehman (1962) 368 U.S. 403, 408-409	14
Boulder v. Holman (1969) 394 U.S. 478, 480-481	14
Gudelj v. Gudelj (1953) 41 Cal.2d 202, 212	19
Hansford v. Lassar (1975) 53 Cal.App.3d 364	19,20,27
Jafeman, In re Marriage of (1972) 29 Cal.App.3d 244	15
Socol v. King (1950) 36 Cal.2d 342	19
United States v. Durham Lumber Co. (1960) 363 U.S. 522, 526-527 .	14
United States v. National Asso. of Real Estate Boards (1950) 339 U.S. 485, 495-496	14

Cases	Page
United States v. Yellow Cab Co. (1949) 338 U.S. 338, 342	14
Statutes	
California Civil Code § 4800.1 . .	18
California Civil Code § 5120.110	21
California Code of Civil Procedure § 695.020	20
28 U.S.C. § 1254	2,8,9,10
28 U.S.C. § 1257	2,9
28 U.S.C. § 1257(2)	8
Miscellaneous	
Federal Rules of Civil Procedure, Rule 52	13
Supreme Court Rule 15, Revised	11
Supreme Court Rule 15.1(g), Revised	7
Supreme Court Rule 16.1, Revised	1,6

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

Helmer T. Pederson, Appellant,
v.
Sylvan Shulman, Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the appellee Sylvan Shulman moves to dismiss the appeal filed on behalf of Helmer T. Pederson, or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Ninth Circuit. The motion is grounded on the fact that the appellant has no standing to invoke this court's appellate jurisdiction.

STATUTORY PROVISIONS INVOLVED

In pertinent part, 28 U.S.C. § 1257 provides:

> [F]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. § 1254 states, in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> . . . .
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of

such appellant, and the review on appeal shall be restricted to the Federal questions presented.

STATEMENT OF THE CASE

On November 19, 1984, judgment in the principal amount of $700,000, plus accrued interest and costs, was entered in the United States District Court for the Central District of California, in Case No. CV 81-6466-RMT(Mx), entitled Sylvan Shulman v. Spacetime Systems Corporation, etc., et al., in favor of the appellee and against appellant Helmer T. Pederson, the judgment debtor, and certain of the other named defendants.

On November 4, 1985, the Honorable Gordon Thompson, Jr., Judge of the United States District Court, Southern District of California, issued an Order For Sale of Dwelling commonly known as 241 North Pacific Avenue, Solana Beach, California ("the property"), as a means of partially

satisfying the outstanding judgment. Appellant Helmer T. Pederson was joint owner of the property with his wife, Marjorie M. Pederson. The trial court found that the dwelling house was community property and subject to execution to satisfy the judgment against the appellant. The full text of the Order, which is attached to appellant's jurisdictional statement as Appendix "A," is incorporated by reference.

Appellant's request for a stay of the Order authorizing the sale of the dwelling was denied by the trial court. No other requests for stay were made or granted, and appellee purchased the property at the execution sale. At the sale, appellee made a cash payment of $70,670.32 (representing appellant's homestead exemption, the current liens on the property and the Marshal's fees)

combined with a credit bid of $246,129.68.

Appellant appealed the Order for Sale of Dwelling to the United States Court of Appeals for the Ninth Circuit. After hearing oral argument, the appellate court affirmed the lower court judgment. Final judgment was entered on April 9, 1987. A copy of the judgment is attached to appellant's jurisdictional statement as Appendix "B" and is hereby incorporated by reference. Appellant's petition for rehearing was denied on May 7, 1987.

Notice of appeal by the judgment debtor to the United States Supreme Court was filed on May 22, 1987. The original jurisdictional statement was mailed on August 5, 1987, ninety days after the denial of the rehearing; however, it has been repeatedly rejected by the court due

to appellant's failure to comply with certain technical requirements. To date, the appeal has not been formally docketed. The motion is premised upon the lack of jurisdiction of this honorable court to entertain and resolve the issues raised on appeal.

ARGUMENT

I

APPELLANT'S MOTION TO DISMISS OR AFFIRM IS TIMELY AND PROPERLY RAISED

Rule 16.1 of the Revised Rules of the Supreme Court of the United States authorizes an appellee to file a motion to dismiss the appeal or, in the alternative, affirm the lower court judgment within thirty days of receipt of the jurisdictional statement grounded upon jurisdictional or procedural defects, lack of a substantial federal

question, or any other pertinent grounds.

The within motion will be filed by the court clerk as soon as the case is officially docketed. Thus, the motion must clearly be considered as timely filed. Furthermore, the motion is properly grounded.

The appeal is not within the jurisdiction of the Supreme Court, and was not taken in conformity with the federal statutes and Rule 15.1, subparagraph g, as more fully discussed infra. Further, the asserted federal issues are not substantial, and were not raised or expressly passed on in the lower court proceedings. No state or federal statutes were declared invalid, and no issues of public interest were involved. In addition, no further argument is needed on the issues that were adjudicated; the underlying dispute

involves issues of fact, the resolution of which was well supported by fact and law. As such, the appeal should be dismissed, and the lower court judgment affirmed.

II

THE APPEAL IS WITHOUT PROPER JURISDICTIONAL BASIS

It is uncertain upon which jurisdictional provision appellant intends to rely. The notice of appeal stated that the appeal was purportedly taken pursuant to 28 U.S.C. § 1257(2). However, the jurisdictional statement ostensibly invoked jurisdiction pursuant to 28 U.S.C. § 1254. Regardless, neither of the above provisions endow the Supreme Court with jurisdiction to adjudicate the appeal with which it is presently faced.

28 U.S.C. § 1257, subparagraph 2, pertains to appeals from the judgment of

a State court where the validity of a state statute has been upheld despite contentions that the statute is repugnant to the Constitution, treaties or laws of the United States. In the case at bar, the judgment debtor appeals from the judgment of the United States Court of Appeals for the Ninth Circuit, a federal court. Thus, § 1257, which relates to state courts, has no application.

28 U.S.C. § 1254 refers to appeals by a party relying on a State statute which is held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. The review on appeal is restricted to the federal questions presented. No state statute was invalidated in the case at hand. In the underlying proceedings, the lower court simply weighed the evidence presented with respect to the questions

of fact and interpreted the relevant statutory provisions, the validity of which were implicitly upheld. Therefore, § 1254 provides no jurisdictional basis for the within appeal.

III

THE FEDERAL ISSUES ARE NOT SUBSTANTIAL AND WERE NOT RAISED IN THE LOWER COURT PROCEEDINGS

As will be discussed more fully in the following section, the alleged federal questions are not substantial. No state or federal statute was declared invalid. The contested order, to which two federal courts concurred, simply involved a question of fact as to whether a presumption had been overcome in the unique circumstances of the case at bar. No issues of public interest were involved.

Further, the appellant failed to raise any of the presently asserted federal issues in any of the lower court proceedings. The alleged federal questions were raised, for the first time, on appeal to the United States Supreme Court.

Rule 15, Revised Rules of the Supreme Court of the United States, states that the jurisdictional statement must contain:

> (g) A concise statement of the case containing the facts material to consideration of the questions presented. The statement of the case shall also specify the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court. (Emphasis in the original.)

Appellant omitted reference to the prior litigation of the federal issues,

because no such litigation or adjudication occurred. They were neither raised nor decided in the lower court proceedings and, therefore, should not be considered on appeal. See, e.g., Adickes v. S. H. Kress & Co. (1970) 398 U.S. 144, 147 n.2.

The appeal is substantively and procedurally defective. It was not, and cannot, be taken in conformity with the relevant jurisdictional statutes and court rules. As such, the lower court judgment should be affirmed or the appeal dismissed.

IV

THE FINDINGS OF THE LOWER COURT WERE NOT CLEARLY ERRONEOUS AND, THEREFORE, MUST BE AFFIRMED

A. Due Deference Should Be Given to the Lower Court Judgment.

Rule 52 of the Federal Rules of Civil Procedure states, in relevant part: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Therefore, if the District Court's account of evidence is plausible in light of the record viewed in its entirety, the reviewing court may not reverse it, even though it may be convinced that had it been sitting as trier of fact it would have weighed the evidence differently. The above proposition is true even when the findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. Anderson v. Bessemer City (1985) 470 U.S. 564, 573-

574. See, also, United States v. National Asso. of Real Estate Boards (1950) 339 U.S. 485, 495-496, and United States v. Yellow Cab Co. (1949) 338 U.S. 338, 342.

Thus, the Supreme Court should not exert its jurisdiction to review findings of fact concurred in by two lower federal courts, unless the findings of fact are clearly erroneous. Cf., Blau v. Lehman (1962) 368 U.S. 403, 408-409 and Boulder v. Holman (1969) 394 U.S. 478, 480-481. Likewise, in dealing with issues of state law, the Supreme Court should be hesitant to overrule decisions by federal courts skilled in the law of a particular state, unless their conclusions are shown to be unreasonable. United States v. Durham Lumber Co. (1960) 363 U.S. 522, 526-527.

The central issue in the matter at hand involves a question of fact, the

manner in which title was intended to be held. The factual determinations of the lower court were well supported by the facts and the law (as discussed in greater detail below) and, consequently, should be deemed binding. (See, In re Marriage of Jafeman (1972) 29 Cal.App.3d 244, and Beck v. Beck (1960) 242 Cal.App.2d 396.) The judgment should not be disturbed on appeal.

B. The Lower Court Judgment was Factually and Legally Correct.

In October of 1953, appellant purchased the subject real property. Appellant married Marjorie M. Pederson in 1960. The couple resided in the dwelling house continuously thereafter, and maintained it as their family residence. In 1964, the Pedersons jointly borrowed funds from Central Federal Savings & Loan for a room addition, which was secured by

a first deed of trust on the property. Concurrent with the above transaction, appellant conveyed the property to "Helmer Pederson and Marjorie M. Pederson, husband and wife, as joint tenants." The grant deed was prepared by a Central Federal bank representative.

At the time of the conveyance, neither of the Pedersons knew or understood the legal significance or difference between holding title as community property or as joint tenants. They received no explanation as to why the grant deed was prepared in the form of a joint tenancy. Throughout their marriage, the Pedersons maintained one checking account into which all of their community earnings were deposited and from which all payments on the Central Federal loan and other property expenses were disbursed.

Based on the above facts, the lower court found that the joint-tenancy presumption had been overcome and that the dwelling house was community property, subject in its entirety to an order for sale to satisfy the judgment against the judgment debtor. (See, Appendix "A" to appellant's jurisdictional statement.) The judgment debtor appealed from the order approving sale, contending that the dwelling house was his separate property and the separate property of his wife, rather than the community property of both, inasmuch as the grant deed stated on its face that they were "joint tenants." After hearing oral arguments, the Court of Appeals affirmed, stating:

> The district court's finding that the Pedersons intended their home to be held as community property was supported by substantial evidence in the record. The

home's sale was therefore proper. Cal. Code Civ. Proc. § 695.020(b) (West Supp. 1987).

The introduction to the jurisdictional statement filed by appellant is misleading. Appellant alleges that the district court characterized the residence as community property "apparently pursuant to California Civil Code . . . Section 4800.1." It is unclear how appellant arrived at that assumption. Neither the district court, nor the court of appeals referred to the aforementioned statutory provision. The dispute was resolved as a factual question of intent.

It is well settled that the form of the instrument under which a husband and wife hold title is not conclusive as to the character of the property. Frequently, property held under a joint-tenancy deed has been characterized as

community property in accordance with the intention, understanding, or agreement of the parties. (See, e.g., Socol v. King (1950) 36 Cal.2d 342 and Gudelj v. Gudelj (1953) 41 Cal.2d 202, 212.)

Hansford v. Lassar (1975) 53 Cal.App.3d 364, involved a factual background similar to that in the case at bar and is directly on point. The appellant misleads the court as to the breadth of the holding in Hansford. In Hansford, a third-party creditor of the husband sought to levy upon, and have an execution sale of, property which had previously been held in joint tenancy by a husband and wife. Immediately after the abstract of judgment had been recorded, the husband had apparently conveyed his interest to his wife to avoid levy against the property. The Court of Appeals set aside the fraudulent

interspousal conveyance, so that title reverted back to joint tenancy between the spouses, and then held that there was sufficient evidence to overcome the presumption that the husband and wife owned the residential property as joint tenants, in light of the evidence that they had conducted themselves throughout their marriage as if that property was community property. The circumstantial evidence considered by the court in Hansford in resolution of the factual issue of title included the exact same facts which exist in the case at bar.

California Code of Civil Procedure § 695.020, upon which the Court of Appeals relied, states, in pertinent part, that community property is subject to enforcement of a money judgment. Further, the community-property interest of the spouse of the judgment debtor is

fully liable for satisfaction of the money judgment. The above statutory provision is reinforced by California Civil Code § 5120.110, subparagraph a, which states as follows:

> Except as otherwise expressly provided by statute, the community property is liable for a debt incurred by either spouse before or during marriage, regardless which spouse has the management and control of the property and regardless whether one or both spouses are parties to the debt or to a judgment for the debt.

Both the factual determinations regarding the characterization of the real property interest and the subsequent order of sale were properly premised. As such, the lower court judgment should be affirmed or, in the alternative, the appeal should be dismissed.

CONCLUSION

The appeal is without proper jurisdictional basis. Further, the

federal issues are not substantial, are in fact nonexistent, and were not raised in the lower court proceedings. Therefore, they cannot be raised for the first time on appeal. The issues are strictly factual, and the lower courts' factual determinations were amply supported by the evidence. As such, further argument and review on appeal is inappropriate. The alleged federal issues are personal to the appellant, and there is no threatened violation of the federal rights of the public-at-large. The only public interest is that of the State of California of uniformity of its decisional law. The judgment of the Court of Appeals is in harmony with the applicable statutory provisions and case law. Reversal would create conflicts which did not heretofore exist.

The appeal is wholly without merit,

and is brought in bad faith to avoid payment of appellant's lawful obligations. In addition to his credit bid of almost a quarter of a million dollars, the appellant tendered cash in excess of $70,000.00 at the marshal's sale, from which appellant and his wife received $55,000.00 for their homestead exemption and Central Federal Savings & Loan received satisfaction in full of their First Deed of Trust. Appellant has not made any offer whatsoever to pay back appellee's substantial cash outlay, nor has he demonstrated any ability to do so or posted a supersedeas bond in lieu thereof. Furthermore, appellant never proferred any payment to appellee as compensation for occupancy of the premises during the ongoing, prolonged litigation. The appellant and his wife lived rent free for several years at the

expense of the appellee.

The appellee recently filed an unlawful detainer action in the San Diego County Superior Court. In his answer, the appellant referred to the within appeal to the United States Supreme Court as an affirmative defense thereto, even though stay of enforcement of the judgment was previously expressly denied.

During the unlawful detainer trial proceedings, appellant asserted that the federal court judgment was not binding on the pending state court proceedings and attempted to re-litigate the entire matter. The trial court found that the appellee obtained all rights, title and interest of both the appellant and his wife pursuant to the United States Marshal's Deed, and was the current legal owner of the subject property. Judgment was entered in favor of the appellee. A

writ of possession was then served by the Marshal on the appellant and his wife, who have since vacated the premises.

At the conclusion of trial, the court stated that it wished to make several observations. The court referred to the Full Faith & Credit Clause and the doctrines of res judicata and collateral estoppel, and indicated that the federal court findings should be enforced pursuant thereto. The court then stated that even if it had the authority to re-litigate the entire matter, it probably had sufficient evidence to overcome the joint-tenancy presumption created by the face of the deed and find, similar to the federal court, that the asset was community property. Finally, the court noted that the judgment creditor of the husband is entitled to reach the community asset in entirety.

Appellant already holds a judgment against appellee in excess of three-quarters of a million dollars which he undoubtedly will never be able to satisfy in full. Appellee did not even request damages for the fair rental value of the premises during the unlawful detainer action and waived all costs because any such award would be worthless. Appellant is obviously aware that he is virtually "judgment proof," inasmuch as any further award of damages would truly constitute an "empty judgment." Consequently, appellant continues to use the judicial system to thwart justice and perpetrate an inequity.

By the bad faith legal tactics being taken by the appellant and his counsel, the appellee has been forced to incur unnecessary legal fees and other expenses. Damages continue to mount for

which appellee will never be able to seek redress. Counsel for appellant was previously warned of the jurisdictional defects of the within appeal and cited to the appropriate authority. However, appellant and his attorney refused to voluntarily dismiss the appeal. As such, appellee respectfully requests sanctions against the attorney for the appellant for unmeritorious litigation and bad faith misuse of the judicial system.

Appellee respectfully contends that this honorable court should dismiss the appeal or affirm the lower court judgment, so as to rule in harmony with the Hansford v. Lassar case and in conformity with the applicable statutory provisions. Likewise, in consideration of the foregoing, any future petition for

certiorari should be expressly denied.

Respectfully submitted,

DATED:
10/12/87

STYN & GARLAND
Jeffrey N. Garland
Tawn H. Skousen

By Tawn H. Skousen
Tawn H. Skousen